

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE: FRESENIUS

GRANUFLO/NATURALYTE DIALYSATE

PRODUCTS LIABILITY LITIGATION

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MDL No. 1:13-md-02428-DPW

DEFENDANT FMCNA’S SECOND OMNIBUS MOTION TO DISMISS

Defendants Fresenius Medical Care Holdings, Inc., d/b/a Fresenius Medical Care North America, Fresenius USA, Inc., Fresenius USA Manufacturing, Inc., and Fresenius Marketing Inc. (“Fresenius”) hereby move to dismiss with prejudice an additional 33 active cases in this multi-district litigation where the plaintiffs have elected not to opt-in to the global settlement and have also failed to comply with Case Management Order No. 17. As made clear by this Court in Case Management Order No. 17 (Doc. 1825) and its further Memorandum Regarding Case Management Order No. 17 (Doc. 1844), the failure of such plaintiffs to file the necessary affidavits or declarations of counsel and a qualified physician or other medical expert is sufficient basis without more for dismissal with prejudice. *See* Doc. 1825 at 7; Doc. 1844 at 2. In addition, the failure to file such affidavits or declarations separately evidences a want of prosecution constituting independent grounds for dismissal with prejudice. *See* Doc. 1844 at 2. Dismissal of such cases with prejudice at this advanced stage of litigation disposes of cases without merit and appropriately focuses the parties’ and Court’s attention on those cases that will continue in litigation for resolution through dispositive motions or trial.

BACKGROUND

In August 2016, Fresenius and Plaintiffs' Leadership entered into a private settlement agreement related to all cases filed in this Court and other jurisdictions relating to Fresenius' acid concentrates GranuFlo[®] and NaturaLyte[®]. Pursuant to a settlement process agreed-upon by the parties, each plaintiff would timely proceed to: (1) opt in to the global settlement; (2) file a stipulation of dismissal of his/her case with prejudice; or (3) decline either to participate in the settlement or stipulate to dismissal with prejudice and proceed with litigation ("Opt-Out Plaintiff"). On January 26, 2017, after hearing, this Court issued Case Management Order No. 17, which required each Opt-Out Plaintiff to produce by March 29, 2017 at 5:00 p.m. (EST), an affidavit or declaration of counsel identifying data supporting his/her claim that GranuFlo[®] or NaturaLyte[®] was used during the corresponding patient's last dialysis treatment prior to alleged injury ("Product Identification Affidavit"), *and* an affidavit or declaration from a physician or other medical expert opining to a reasonable degree of medical certainty that GranuFlo[®] or NaturaLyte[®] caused, or was a substantial contributing factor in causing, the patient's injury. The Case Management Order made it clear that failure to comply could result in this Court's dismissal with prejudice. Doc. 1825 at 7. Further punctuating this point, on March 9, 2017, the Court issued a Memorandum Regarding Case Management Order No. 17 in which it stated there should be no misunderstanding that the failure to comply with the case management order was sufficient grounds for dismissal with prejudice.

ARGUMENT

Since its initial Omnibus Motion to Dismiss filed on April 11, 2017, Fresenius identified an additional 33 Opt-Out Plaintiffs who have been delinquent in complying with Case Management Order No. 17.¹ The delinquencies fall into the following three categories:

- Category A – Opt-Out Plaintiffs who have failed to provide any response to Case Management Order No. 17. *See* Exhibit A (identifying 30 cases).
- Category B – Opt-Out Plaintiffs who have submitted responses to Case Management Order No. 17 indicating that he/she will *not* be providing a substantive response to Case Management Order No. 17. *See* Exhibit B (identifying 2 cases).
- Category C – Opt-Out Plaintiffs who have submitted an incomplete response to Case Management Order No. 17 containing only an affidavit or declaration of counsel concerning product identification but not an affidavit or declaration of a physician or other medical professional. *See* Exhibit C (identifying 1 case).

The above-categorized Opt-Out Plaintiffs are in violation of Case Management Order No. 17 and, as such, hinder the resolution of this longstanding litigation. Accordingly, pursuant to Section 4 of Procedural Order No. 17, the above-categorized cases contained in Exhibits A, B and C to this motion should be dismissed with prejudice.

¹ Fresenius continues to work with Plaintiffs' Leadership to resolve disputes concerning whether certain plaintiffs timely attempted to opt in to the global settlement. Depending on the resolution of those disputes, Fresenius anticipates that additional cases may be ripe for dismissal with prejudice pursuant to Case Management Order No. 17 and may file a third Omnibus Motion to Dismiss as necessary.

CONCLUSION

For the above reasons, Fresenius respectfully requests that this Court grant this second omnibus motion and dismiss with prejudice all cases listed in attached Exhibits A, B, and C.

Dated: June 14, 2017

Respectfully submitted,

/s/ Maria R. Durant

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CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on June 14, 2017.

/s/ Maria R. Durant
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